In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 769

EDWARD JACKSON MURRAY, PETITIONER

v.

LIEUTENANT GENERAL ALBERT C. WEDEMEYER, UNITED STATES ARMY, COMMANDING GENERAL, SIXTH ARMY, PRESIDIO OF SAN FRANCISCO, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT

Despite petitioner's earnest insistence to the contrary, it is clear that this habeas corpus proceeding has been rendered moot as the result of his release from imprisonment on parole granted on his own application therefor during the pendency of his appeal from the order of the District Court dismissing, after hearing, his petition for a writ of habeas corpus (R. 136, 141–142; Pet. 3). The cases cited by petitioner are inapposite, for it is settled law in the federal courts that, except where release is obtained in connec-

tion with the habeas corpus proceeding itself, habeas corpus will not lie where there is no physical or bodily restraint from which the petitioner could be released by the writ. Mere moral restraint imposed by technical arrest or custody or by conditions of parole or bail will not support habeas corpus. See *Eagles* v. *Samuels,* 329 U. S. 304, 306–307; *Baker* v. *Hunter,* 323 U. S. 740;[1] *Zimmerman* v. *Walker,* 319 U. S. 744; *Tornello* v. *Hudspeth,* 318 U. S. 792; *Ex parte Weil,* 317 U. S. 597; *Weber* v. *Squier,* 315 U. S. 810; *McNally* v. *Hill,* 293 U. S. 131, 137, 139; *Stallings* v. *Splain,* 253 U. S. 339, 343; *Johnson* v. *Hoy,* 227 U. S. 245; *Wales* v. *Whitney,* 114 U. S. 564, 571–574; *Van Meter* v. *Sanford,* 99 F. 2d 511 (C. A. 5); *United States* v. *Tittemore,* 61 F. 2d 909 (C. A. 7); *Unverzagt* v. *United States,* 5 F. 2d 494 (C. A. 9), certiorari denied, 269 U. S. 566.[2]

[1] The *Baker* case (No. 151, Oct. Term 1944) involved a federal prisoner released on expiration of his minimum term and subject, under 18 U. S. C. (1940 ed.) sec. 716b (now 18 U. S. C. 4164), to being treated as if released on parole until the expiration of his maximum term. Substantially the same arguments against mootness were made there as are presented by the instant petitioner.

[2] *Hirshberg* v. *Cooke,* 336 U. S. 210, and *Eagles* v. *Samuels,* 329 U. S. 304, do not aid petitioner (see Pet. 16, 17), for in those cases the petitioners had been released pursuant to the judgments of the lower courts and the custodians sought reversal. This Court pointed out in the *Eagles* case that different considerations apply, on the issue of mootness, where "release is obtained through the assertion of judicial power. It is the propriety of the exercise of that power which is in

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1950.

---

issue in the appellate court, whether the prisoner is discharged or remanded to custody. Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. Cf. *St. Pierre* v. *United States*, 319 U. S. 41, 42, and cases cited. Affirmance makes the prisoner's release final and unconditional. Reversal undoes what the *habeas corpus* court did and makes lawful a resumption of the custody." 329 U. S. at 307–308.

Petitioner is mistaken in asserting (Pet. 16) that the *Hirshberg* case was decided in this Court after the sentence had expired. As we have pointed out, Hirshberg was released from custody pursuant to the judgment of the District Court and, obviously, his sentence did not continue to run after that time.

U. S. GOVERNMENT PRINTING OFFICE: 1950